UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE NICHOLAS TSOUCALAS, SENIOR JUDGE

GLOBE METALLURGICAL, INC.,	)	
Plaintiffs,	)	
v.	)	Court No. 07-00022
UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S COMBINED REPLY TO PLAINTIFF'S RESPONSE TO THE MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION TO STAY PROCEEDINGS

Defendant, the United States, respectfully submits this reply to the brief filed by Globe Metallurgical, Inc. ("Globe") in response to our motion to dismiss the complaint for failure to state a claim upon which relief can be granted. We also respond to Globe's motion to stay proceedings pending a "final and conclusive" determination in Globe Metallurgical v. United States, Court No. 07-0011 (Ct. Int'l Trade), which concerns a determination by the U.S. International Trade Commission ("ITC") in the injury determination in the antidumping duty investigation of silicon metal from Brazil. Globe Motion at 7.

As we demonstrate below, Globe has failed to rebut or otherwise undermine our demonstration that it can prove no set of facts that would entitle it to the relief it requests in this action, and our motion to dismiss should be granted. For this reason, a stay is not warranted. In addition, even if Globe could state a claim, its motion for stay should be denied because: (1) the balance of interests do not weigh in Globe's favor; and (2) Globe's claim for relief in this case is based upon baseless speculation that Commerce would fail to reinstate the order should Globe prevail in its challenge to the ITC determination, contravening the presumption of regularity.

ARGUMENT

I. Globe Has Failed to State a Claim Upon Which Relief May Be Granted

In our motion to dismiss, we demonstrated that Globe has failed to state a claim upon which relief may be granted because, accepting all well-pleaded facts as true and viewed in the light most favorable to Globe, Commerce's revocation of the antidumping duty order on silicon metal from Brazil pursuant to 19 U.S.C. 1675(d)(2) was in accordance with law. In its response, Globe has failed to assert otherwise.

A. Commerce Had A Clear Non-Discretionary Duty To Revoke The Order Under The Circumstances Present In This Case And Globe Does Not Allege That Commerce Violated The Statute

The relevant statutory provisions demonstrate that Commerce had a clear, nondiscretionary, and indisputable duty to revoke the order. Commerce's revocation pursuant to section 1675(d)(2) is a ministerial act that Commerce performed in accordance with a statutory mandate. In particular, the statute provides as follows:

> (2) Five-year reviews
>
> In the case of a review conducted under subsection (c) of this section, the administering authority shall revoke a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, unless—
>
> (A) the administering authority makes a determination that dumping or a countervailable subsidy, as the case may be, would be likely to continue or recur, and
>
> (B) the [International Trade] Commission makes a determination that material injury would be likely to continue or recur as described in section 1675a (a) of this title.

19 U.S.C. § 1675(d)(2) (emphasis added). Thus, pursuant to the statute, Commerce is obligated to revoke an order where, as here, the ITC has determined that material injury would not be

likely to continue or recur. Under these circumstances, the statute provides Commerce with no discretion to make a determination whether or not to revoke the order. Section 1675(d)(2) of the statute sets forth no criteria for Commerce to consider. Moreover, Commerce conducts no proceeding in which to make an administrative determination. Accordingly, upon notification from the ITC of its determination that injury is not likely to continue or recur, Commerce promptly revoked the order. Globe cannot establish that Commerce's revocation of the order was improper because the statute expressly mandated that Commerce revoke the order. Indeed, Globe concedes in its complaint that Commerce "shall revoke an antidumping duty order" under these circumstances, and does not identify any present violation of the statute. Compl. ¶ 19.

Despite the unequivocal mandate of the statute, Globe contends that Commerce's revocation will be shown to be improper if Globe prevails in its challenge to the ITC's determination. Globe misconstrues the statute's clear mandate by inserting additional criteria for revocation that appear nowhere in section 1675(d)(2), contending that "revocation of an order is only proper based on a [negative] Commission determination, supported by substantial evidence and in accordance with law . . . ." Resp. at 7 (emphasis added). However, once the ITC issues a determination that material injury would not be likely to continue or recur, the statute does not permit Commerce to review that determination. Instead, section 1675(d)(2) requires Commerce to perform the ministerial act of revoking the order, which it properly did in this case, a fact that Globe does not dispute in its response.

B. Globe Fails To Cite Any Authority For Its Prophylactic Action Challenging A Determination It Concedes Is In Accordance With Law

Globe seeks an order from the Court requiring Commerce to reinstate the order if Globe should prevail in its challenge to the ITC's determination in Globe Metallurgical, Inc. v. United

States International Trade Commission, Ct. No. 07-00011. Globe's action is premature because it has not yet obtained a final and conclusive Court decision in the ITC action that would result in a notification of change in the ITC's determination. As with its duty to revoke, Commerce is bound to reinstate the order if the legal basis for revocation pursuant to section 1675(d)(2) is withdrawn. Thus, should a final and conclusive court decision affirm an ITC remand determination that injury would be likely to continue or recur, Commerce would carry out the ministerial act of reinstating the order upon notification by the ITC. Accordingly, Globe has not been denied the reinstatement that it seeks to have the Court order.

In its response, Globe argues that it merely seeks to preserve its ability to obtain reinstatement of the order should it prevail in its challenge to the ITC's determination. Globe Br. at 8-10. In support of its action, Globe compares the mandatory revocation pursuant to section 1675(d)(2) at issue in this case to Commerce determinations to exercise discretionary authority to revoke an order pursuant to section 1675(d)(1). Id. Globe states it is concerned this action may be necessary to preserve its right to obtain reinstatement of the order, as it is in the case of determinations to revoke pursuant to section 1675(d)(1). Id. Globe's arguments lack merit.

1. Globe Can Seek Writ Of Mandamus If Appropriate

Globe's concerns regarding the loss of its ability to secure the benefit of a decision in the ITC litigation that is favorable to it are misplaced. There is no basis for assuming that Globe would be precluded from seeking judicial relief to obtain reinstatement of the order should it prevail in its challenge of the ITC determination. Indeed, Globe concedes that it is unaware of any precedent applicable to the facts of this case that would preclude it from obtaining reinstatement if it should prevail in its challenge to the ITC's determination. Globe Br. at 9. The

present action is not necessary for Globe to preserve its right to obtain reinstatement of the order because, upon notification that the ITC's determination had been changed from negative to affirmative, any failure by Commerce to reinstate the order pursuant to section 1675(d)(2) would give rise to a cause of action for a writ of mandamus to compel Commerce to perform this ministerial act. 28 U.S.C. § 2643(c)(1). See, e.g., Nakijima All Co., Ltd. v. United States, 691 F. Supp. 358, 361 (Ct. Int'l Trade 1988) (writ of mandamus may be employed to compel the performance of a ministerial duty where performance has been refused or unreasonably delayed).

With respect to the ability to obtain reinstatement of the order, the mandatory revocation at issue is unlike a determination by Commerce to exercise its discretion to revoke pursuant to section 1675(d)(1). A determination to revoke pursuant to section 1675(d)(1) reflects the results of a proceeding in which Commerce exercised its discretionary authority to revoke – unlike the revocation pursuant to 1675(d)(2) at issue in this case. The statute provides, in relevant part, that revocation is a discretionary act only with respect to administrative reviews and changed circumstance reviews:

> The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) [administrative reviews] or (b) [changed circumstance reviews].

19 U.S.C. § 1675(d)(1) (emphasis added). Thus, to obtain reinstatement of an order revoked pursuant to Commerce's discretionary authority under section 1675(d)(1), a party must challenge Commerce's determination to revoke.

In this case, by contrast, the revocation at issue was mandatory because it was effectuated pursuant to section 1675(d)(2). The revocation at issue is not part of a determination resulting

from a Commerce proceeding in which Commerce exercised discretion with respect to whether or not to revoke the order. Instead, as demonstrated above in section II.A, the revocation challenge by Globe is a mandatory ministerial act carried out by Commerce in accordance with the statute pursuant to its administration of the antidumping law.

2. Globe's Arguments Are Based Upon Speculation And Contravene The Presumption Of Regularity

The Supreme Court has just clarified that, to survive a motion to dismiss for failure to state a claim upon which relief can be granted, "factual allegations must be enough to raise a right to relief above the speculative level," upon the assumption that all the allegations in the complaint are true even if doubtful in fact. Bell Atlantic Corp. v. Twombly, 550 U. S. ____, 2007 WL 1461066 at *8 (May 21, 2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235.236 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")). Before a party is entitled to present facts in support of its claim, it must first establish that it has adequately stated a claim. Id. at *11. The Supreme Court in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), had held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no set of facts" in support of his claim which would entitle him to relief. Id. at *1. The Supreme Court in Bell Atlantic, however, clarified that "[t]he phrase [that] is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.") (citation omitted). Id. at *11.

There is no valid basis for Globe or this Court to assume that Commerce would not perform its ministerial acts. The Government is expected to act in a regular manner and obey statutes. See United States v. Chem. Found., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (citations omitted). In accordance with this principle, the Court of Appeals for the Federal Circuit has held that "Government officials are presumed to do their duty, and one who contends they have not done so must establish that defect by 'clear evidence.'" Carolina Tobacco Co. v. Bureau of Customs and Border Protection, 402 F.3d 1345, 1350 (Fed. Cir. 2005); see also Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, (Fed. Cir. 2002) ("clear and convincing most appropriately describes the burden of proof applicable to the presumption of the government's good faith"). Accordingly, a claim is insufficient if it is based upon unsupported suspicions that the Government would not act timely, or would not act at all, in accordance with its duties. Koyo Corp. of U.S.A. v. United States, 403 F. Supp. 2d 1305, 1310 (Ct. Int'l Trade 2005); see also Geum Poong Corp. v. United States, 26 C.I.T. 991, 1002 (2002) (declining plaintiff's "invitation to speculate as to whether Commerce will fail to comply with its statutory mandate for publishing the results of its redetermination" and concluding that "[i]f Commerce does not perform its duties timely, [plaintiff] may pursue its remedies at that time.").

Accordingly, Globe's complaint should be dismissed for failure to state a claim for which relief can be granted. Globe's alternative request for a declaratory judgment is similarly unnecessary because a sufficient explanation of the applicable law could be set forth in the Court's decision to grant the motion to dismiss.

II. Globe's Motion For A Stay Of Proceedings Should Be Denied

A. Globe Bears The Burden To Establish That A Stay Is Necessary

"When and how to stay proceedings is within the sound discretion of the trial court." Cherokee Nation of Okla. v. United States, 124 F.3d 1413, 1416 (Fed. Cir. 1997). In deciding whether to stay proceedings, the Court "must weigh competing interests and maintain an even balance," taking into account those of the plaintiff, the defendant, non-parties or the public, and even itself. Tak Fat Trading Co. v. United States, 24 C.I.T. 1376, 1377 (citing Hill v. Mitchell, 30 F. Supp.2d 997, 1000 (S.D. Ohio 1998)). "[A] movant must make a strong showing that a stay is necessary. . . ." Id. at 1377 (citing Commodity Futures Trading Comm'n v. Chilcott Port-folio Management, Inc., 713 F.2d 1477, 1484 (10th Cir. 1983)) (emphasis added).

B. The Court Should Dismiss This Case Now Rather Than Enter An Unnecessary Stay

This action should not be stayed because, as we demonstrate above, it should be dismissed. Indeed, the fact that Globe seeks a stay of proceedings in the particular circumstances of this case underscores the absence of a valid claim.

A stay is unwarranted because, as Globe concedes in its complaint, Compl. ¶ 19, Commerce "shall revoke an antidumping duty order" pursuant to 19 U.S.C. § 1675(d)(2) where the ITC determines pursuant to a sunset review that "material injury would be likely to continue or recur." Globe's action is premature because it has yet to obtain a final and conclusive Court decision in the ITC action that would result in notification to Commerce of a change in the ITC's determination. As with its duty to revoke, Commerce is legally bound to reinstate the order if the legal basis for revocation pursuant to section 1675(d)(2) is withdrawn. Thus, should a final and conclusive court decision affirm an ITC remand determination that injury would be likely to

continue or recur, Commerce would carry out the ministerial act of reinstating the order upon notification by the ITC. Accordingly, Globe has not been denied the reinstatement that it seeks to have the Court order. A stay, if granted, would serve no purpose because Globe's complaint fails to state a claim for which relief can be granted.

C. Plaintiff Has Failed To Establish That A Stay Is Warranted

A court possesses the discretion to "hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254 (1936).

In addition to failing to state claim upon which relief may be granted, Globe has failed to make a strong showing that a stay is warranted because: (1) the balance of interests do not weigh in Globe's favor; and (2) Globe's claim for relief in this case is based on speculation that Commerce will fail to reinstate the order should Globe prevail in its challenge to the ITC determination.

1. Globe Has Not Demonstrated That It Would Suffer Injury To Warrant A Stay Of Proceedings

The Rules of the Court of International Trade provide, in part, that actions pursuant section 1581(c) – such as this action – "shall be given precedence" over all other actions not involving temporary or preliminary injunctive relief. C.I.T. R. 3(g).

To determine whether a stay is warranted, a court "must weigh competing interests and maintain an even balance, taking into account those of the plaintiff, the defendant, non-parties or

the public, and even itself." Georgetown Steel Co. v. United States, 259 F. Supp. 2d 1344, 1346 (Ct. Int'l Trade 2003); See also Cherokee Nation, 124 F.3d at 1416 ("In deciding to stay proceedings indefinitely, a trial court must first identify a pressing need for the stay. The court must then balance interests favoring a stay against interests frustrated by the action.").

Accordingly, the party requesting the stay, "must make out a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay will work damage to some one [sic] else." Landis, 299 U.S. at 255; see also Neenah Foundry Co. v. United States, 24 C.I.T. 202 (Ct. Int'l Trade 2000). The movant for the stay must "make a strong showing" that a stay is necessary and that "the disadvantageous effect on others would be clearly outweighed." Commodity Futures Trading Comm'n, 713 F.2d at 1484; see also Klein v. Adams & Peck, 436 F.2d 337, 339 (2d Cir. 1971) ("The right to proceed in court should not be denied except under the most extreme circumstances").

In this case, Globe cannot demonstrate any prejudice that would warrant a stay. Globe concedes that it is unaware of any precedent applicable to the facts of this case that would preclude it from obtaining reinstatement if it should prevail in its challenge to the ITC's determination. Globe Br. at 9. As explained above, in the event the ITC's determination changes from negative to affirmative and Commerce fails to reinstate the order pursuant to section 1675(d)(2), Globe could obtain reinstatement of the order by filing a petition for a writ of mandamus to compel Commerce to perform this ministerial act in the administration of the antidumping law as mandated by the statute. 28 U.S.C. § 2643(c)(1); Nakijima All Co., Ltd. v. United States, 691 F. Supp. 358, 361 (Ct. Int'l Trade 1988) (writ of mandamus may be employed to compel the performance of a ministerial duty where performance has been refused or

unreasonably delayed). However, Globe has no basis to assume that Commerce would not comply with the statute in the first instance. See Koyo, 403 F. Supp. 2d at 1310; Geum Poong, 26 C.I.T. at 1002.

Globe asserts that no party would be prejudiced by a delay. However, Globe's assertion is insufficient pursuant to Landis because Globe must clearly establish that it would suffer some prejudice from proceeding with its case. Indeed, Globe cannot establish any injury from having to prosecute its case because the burden of proceeding is minimal. Globe's complaint presents a narrow legal issue: whether Commerce issued a notice of revocation in conformity with its statutory obligations. There are no factual disputes, the procedural background is not extensive, and the statutory language is clear. Consequently, the parties may readily brief the issues presented in the complaint. Accordingly, Globe should be prepared to prosecute its action as filed in an expeditious manner as contemplated by the Rules of the Court. To the extent that Globe currently cannot, or will not, brief its claim, that inability simply demonstrates why this case should be dismissed.

In the absence of any demonstration of prejudice, Globe's motion should be denied.

2. Globe's Stay Motion Is Predicated Upon Speculation

In evaluating whether to grant a request for a stay, this Court has considered what effect, if any, the resolution of the issues in the other action would have upon the case to be stayed, whether it be a dispositive effect or it would streamline or clarify the issues in the instant case. See An Giang Agri. & Food Imp. Exp. Co. v. United States, 350 F. Supp. 2d 1162, 1163 (Ct. Int'l Trade 2004). A stay is not warranted where the potential effect of the second case on the case sought to be stayed is too speculative and attenuated. Neenah Foundry, 24 C.I.T. at 204;

Tak Fat, 24 C.I.T. at 1379. Cf. Timken v. Regan, 552 F. Supp. 47, 53 (Ct. Int'l Trade 1982) (staying action contesting legality of Customs' liquidation of certain entries of tapered roller bearings pending outcome of a second case challenging Commerce's finding that the bearings were sold at less-than-fair value based upon a finding that a decision in the companion case will have a "direct bearing" on question of the propriety of liquidation).

Here, a stay is not warranted pending the ITC litigation. The relief requested in this action is premised upon speculation that Commerce will fail to reinstate the order if Globe should prevail in its challenge to the ITC determination. As with its duty to revoke, Commerce is bound to reinstate the order if the legal basis for revocation pursuant to section 1675(d)(2) is withdrawn. Thus, should a final and conclusive court decision affirm an ITC remand determination that injury would be likely to continue or recur, Commerce would carry out the ministerial act of reinstating the order upon notification by the ITC. See Koyo, 403 F. Supp. 2d at 1310; Geum Poong, 26 C.I.T. at 1002.

Accordingly, given that the balance of interests do not weigh in Globe's favor and that Globe's complaint is based upon mere speculation, a stay in this case is unwarranted.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss this action for failure to state a claim upon which relief can be granted, and deny the motion for a stay

Respectfully submitted,

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May 23, 2007

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CERTIFICATE OF SERVICE

I hereby declare that on the 23rd day of May, 2007, I caused to be served copies of "DEFENDANT'S CONSOLIDATED REPLY TO PLAINTIFF'S RESPONSE TO THE MOTION TO DISMISS AND RESPONSE TO PLAINTIFFS' MOTION TO STAY PROCEEDINGS," in the following manner addressed as follows:

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UNITED STATES COURT OF INTERNATIONAL TRADE

GLOBE METALLURGICAL INC.,	)	
Plaintiff,	)	
v.	)	Court No 07-00022
UNITED STATES,	)	
Defendant.	)	

ORDER

Upon consideration of defendant's motion to dismiss, plaintiff's response and motion for a stay, defendant's reply and response thereto, and all other pertinent papers, it is hereby

ORDERED that defendant's motion to dismiss is GRANTED; and it is further

ORDERED that this case is dismissed with prejudice; and it is further

ORDERED that the motion to stay proceedings is denied.

_____
Nicholas Tsoucalas, Senior Judge

Dated: _____, 2007

New York, New York